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Supreme Court, U.S.
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No. 03-1272

In the Supreme Court of the United States

CAREY DUNAI LOHRENZ,
Petitioner,

v.

ELAINE DONNELLY,
Center for Military Readiness, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the First Amendment requires that an officer in the United States Navy who was the first female pilot to be assigned directly from the training command to the F-14 Tomcat fighter aircraft in June 1993, be treated as a "limited-purpose public figure" for purposes of the law of defamation, where the officer voluntarily chose such assignment during a period when a pre-existing substantial public controversy existed over the assignment of women to combat positions in the United States Armed Forces and where a substantial related controversy existed as to whether the United States Navy applied double standards in the training of its female combat pilots in order to gender-integrate close combat units in the United States Armed Forces.

2. Whether one of the first female pilots trained to fly the F-14 Tomcat fighter aircraft should be deemed a "limited-purpose public figure" when she voluntarily chose such military assignment at a time in which the role of women in combat and the issue of double-standards in the training of females for combat positions were the subject of substantial public controversy and debate.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent, CENTER FOR MILITARY READINESS respectfully submits this Corporate Disclosure Statement.

Respondent, CENTER FOR MILITARY READINESS, a Michigan non-profit corporation, is not a publicly held company, and there is no parent or publicly held company owning 10% or more of the stock of CENTER FOR MILITARY READINESS.

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OPINION BELOW

On December 12, 2003 the United States Court of Appeals for the District of Columbia Circuit rendered its published opinion in *Lohrenz v. Donnelly*, 350 F.3d 1272 (D.C.Cir. 2003) (Pet.App.A). The Memorandum Opinion of the United States District Court for the District of Columbia, published at 223 F.Supp.2d 25 (D.D.C. 2002), was rendered on August 16, 2002 (Pet.App.B).

STATEMENT OF JURISDICTION

This Honorable Court possesses jurisdiction pursuant to 28 U.S.C. §1254(1) and the Petition was filed within ninety (90) days of the rendering of the published opinion of the United States Court of Appeals for the District of Columbia Circuit in *Lohrenz v. Donnelly*, 350 F.3d 1272 (D.C.Cir. 2003).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides: "Congress shall make no law... abridging the freedom of speech, or of the press...."

STATEMENT OF THE CASE

Respondent ELAINE DONNELLY is the President of Respondent CENTER FOR MILITARY READINESS, an independent, non-profit public policy organization that advocates sound military personnel policies. Contrary to Petitioner's representations, statements and documents produced by the Respondents were published not to oppose women in combat, but for the clearly defined purpose of promoting high, uncompromised standards in carrier aviation,

the Navy's most hazardous occupation. Respondents have consistently supported high standards for both men and women in all forms of military training.

The Petitioner, Lt. Carey Dunai Lohrenz (LOHRENZ), was sworn into the Navy as an officer candidate in 1990, and graduated from Aviation Officer Candidate School with academic honors and received her commission on May 17, 1991. She successfully completed Primary Flight Training on February 3, 1992 with first place honors (Commodore's List). As a consequence of those achievements, LOHRENZ was permitted to choose between jet aircraft, propeller driven aircraft, or helicopters. She voluntarily chose the jet "pipeline." As she ranked in the top of her class, later she was able to choose her preferred choice of aircraft, and she consciously chose carrier-based combat aviation.

LOHRENZ voluntarily chose Navy tactical aviation in the midst of a substantial national controversy over women in combat,[1] a controversy of which she was well aware. LOHRENZ actually testified before the Naval Inspector General (IG) that she entered combat aviation despite warnings from her father. LOHRENZ chose combat aviation by filling out her "dream sheet" for future assignment on April 23, 1993, two days after then-Secretary of Defense Les Aspin, in a most controversial move, lifted the Navy's exclusion on the assignment of women to combatant aircraft. Well aware of Aspin's official actions, LOHRENZ listed her

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[1] The Petitioner essentially concedes that a pre-existing public controversy existed over women in combat at the time she chose to become an F-14 fighter pilot. *Petition*, at 1 ("At the time Lohrenz became an F-14 fighter pilot, the role of women in combat was controversial"). Such concession is a marked reversal from the contentions made by Petitioner in the courts below.

preferences as "[F-18] Hornets West Coast, [F-18] Hornets East Coast, F-14s West Coast, F-14s East Coast, and possibly A-6s," all combat aircraft assignments.

On June 25, 1993 LOHRENZ became the first female pilot to be assigned directly from the training command to a combat aircraft -- the F-14 Tomcat. LOHRENZ was sent to NAS Miramar in San Diego in July 1993 for training in VF-124, an F-14 Fleet Replacement Squadron ("FRS") -- previously known as a Replacement Air Group ("RAG"). Contrary to the Petitioner's claims, LOHRENZ's FRS training records, which included numerous failing grades marked by "pink sheets" for unsatisfactory performance, illustrated that she struggled from the very start of F-14 training, which ended in July 1994.

LOHRENZ was in the same class at NAS Miramar with the late Lt. Kara Hultgreen, and both women "carrier qualified" on their second attempts in July 1994. LOHRENZ and Hultgreen joined VF-213, a fighter squadron then attached to the U.S.S. *Abraham Lincoln*. Both women were recognized as "pioneers" in Naval combat aviation, an accomplishment that LOHRENZ admitted resulted in significant media attention. LOHRENZ herself recognized that a "double standards" issue existed when she was quoted in a story in the September 7, 1993 Milwaukee *Journal*, titled "Pilot May Be First to Break a Navy Gender Barrier," as saying: "I don't get any preferential treatment because I'm a woman, and the guys in my squad treat me as an equal."

On October 25, 1994 Lt. Kara Hultgreen died as she crashed her F-14 while trying to land it on the *Abraham Lincoln*. Multiple newspaper and television stories followed the tragedy, debating issues of women in combat aviation, double-standards in the training of female fighter pilots and

the credibility of the Navy in claiming that "engine failure" was the primary cause of the mishap. Six months before the publication of the *Special Report: Double Standards in Naval Aviation*, most news stories that questioned Hultgreen's training directly or indirectly questioned LOHRENZ's as they both received their training together. On October 27, 1994 an article appeared in the San Diego *Union-Tribune*, referring to Hultgreen and "another woman" as "the first two females to qualify to take off and land supersonic fighters on carrier decks," and questioning whether Hultgreen should have been graduated to the fleet. It stated:

> ... officers, who declined to be identified by name, contended that she was allowed to advance because of pressure from senior officials eager to change the image among some that the naval aviation community is a chauvinistic boys' club hostile to women.

The *New York Times* of October 30, 1994, in an article titled "Pilot's Death Renews Debate Over Women in Combat Role," claimed:

> Some male pilots have complained that the first group of women allowed to fly combat missions since the Pentagon lifted a ban last year have received preferential treatment from a Navy hierarchy eager to push them through the training pipeline to erase the stain of the Tailhook sexual harassment scandal. Navy officials adamantly deny this.

The *New York Times* article was re-published in the San Diego *Union-Tribune* on October 30, 1994.

> A *Navy Times* editorial of November 7, 1994 stated: some male pilots think standards have been lowered,

> and lives jeopardized, out of the Navy's desire to be politically correct is also a given, whether true or not. Has the Navy rushed some women through aviation training, perhaps as part of a post-Tailhook strategy to reinstate the service's good name among some of its toughest critics? We don't know. But it's a question worth pursuing and one that, if true, needs immediate correction.

That same day, the cover story of the *Navy Times* read:

> Now that the first female combat pilot has been lost at sea, questions will inevitably be raised about Lt. Kara S. Hultgreen's training, skills and qualifications. In fact, those questions began just hours after her plane went down. West Coast officers familiar with her squadron said some of her colleagues felt that she **and VF-213's other female pilot, Lt. (jg) Carey Lohrenz**, were being pushed too fast and perhaps under too much pressure -- from the Navy, **the media and everyone else putting the spotlight on the first women pilots.**

(Emphasis added).

On November 11, 1994 a segment of the CBS *Morning News* was devoted to the Hultgreen crash and the questions that arose in its aftermath. Multiple articles and editorials concerning the Hultgreen crash and the "double standards" issue followed in the Chicago *Tribune*, the Air Force *Times*, the Navy *Times*, and the Los Angeles *Times*. On February 28, 1995 ABC-TV's *Nightline* program focused on the Hultgreen crash, and the broadcast was replete with references to double-standards in naval aviation and the questions raised by Hultgreen's death. In her deposition,

LOHRENZ admitted that even she did not believe the Navy's "engine failure" story as presented at a Navy news conference and on ABC *Nightline*.

LOHRENZ also admitted in her deposition that she was the focus of extensive press and media attention long before the Respondents published anything about her. LOHRENZ testified that when she chose to become an F-14 pilot she knew she would be the subject of publicity, and she acknowledged that her likeness was even utilized by the Navy for a recruiting poster. LOHRENZ testified that after the death of Lt. Kara Hultgreen, she felt like she was under the spotlight of the media as the only remaining woman F-14 carrier-qualified pilot.

Adm. Stanley Arthur, the Vice Chief of Naval Operations, testified that following the Hultgreen crash there was considerable public controversy and media attention over whether Hultgreen and LOHRENZ were qualified to fly the F-14. He said that he was concerned, and that civilians such as DONNELLY had the right to be concerned about the subject. Adm. Kendall Pease, the retired Chief of Naval Information (CHINFO), echoed Adm. Arthur's testimony.

Shortly after the Hultgreen mishap, Lt. Patrick J. Burns, USN, then a Radar Intercept Officer (RIO) and one of LOHRENZ's and Hultgreen's instructors, placed an unsolicited telephone call to the Respondents from San Diego. He advised Respondent DONNELLY of his concerns about compromises made during the F-14 training of Hultgreen and LOHRENZ in the FRS, the unwillingness of local commanders to acknowledge them, the persistent attempts by some Navy officials to mislead the public about Hultgreen's death and serious training errors that presaged it, and his

concern that acceptance of the *status quo* would elevate risks for both men and women in combat aviation.

Burns sent Respondent DONNELLY a detailed letter dated December 14, 1994 asserting that both Lt. Kara Hultgreen and LOHRENZ had been promoted because of political pressure to incorporate women in tactical aviation, with their competence to fly the F-14 in combat operations as a secondary consideration. Burns indicated that he was concerned about safety and high standards in naval aviation and that naval commanders had not responded to concerns about Hultgreen's and LOHRENZ's competence that he had expressed on several occasions -- twice in the presence of others. For Burns as well as DONNELLY, the compelling issue was safety and excellence in carrier aviation.

Longstanding performance deficiencies that LOHRENZ did not correct herself put her on the "watch list" of carrier squadron VF-213 on January 3, 1995, long before the Respondents published anything about her. On January 6, 1995 Respondent DONNELLY met with Adm. Stanley Arthur in Washington, D.C. to attempt to verify the events and practices described by Burns and to allow Arthur to respond to them. Donnelly related to him a chronicle of events, including a high number of major errors marked with "pink sheets" for unsatisfactory performance, indicating the Navy tried to bring women into combat roles even if it meant changing the definition of "qualified." By letter dated January 16, 1995 DONNELLY and CMR asked Sen. Strom Thurmond, then-Chairman of the Senate Armed Services Committee, to investigate whether the statements of DONNELLY's known but unnamed source (Lt. Burns), regarding the training of Hultgreen and LOHRENZ, were true or not.

On February 7, 1995 Lt. Burns sent to DONNELLY, via facsimile, two pages of the FRS training records of LOHRENZ and Hultgreen. DONNELLY again met with Adm. Arthur on February 8, 1995. Burns mailed copies of the FRS training records of LOHRENZ and Hultgreen to DONNELLY on March 3.

In response to the letter of DONNELLY and CMR to Sen. Thurmond, and in apparent response to DONNELLY's discussions with him at their first meeting, Adm. Arthur referred the matter to Rear Adm. Lyle Bien for investigation. After interviewing LOHRENZ's VF-124 instructors in San Diego, including Lt. Burns, Bien prepared a written report, dated January 31, 1995. At a third meeting held on March 24, 1995, Adm. Arthur allowed DONNELLY and Robert Carey, an aide to then-Sen. Spencer Abraham, to examine Bien's January 31 report for approximately twenty minutes. The "Bien Report" specifically referenced DONNELLY's letter to Sen. Thurmond and its attachment, and found the information contained therein to be, in Bien's words, "largely accurate." The "Bien Report" also contained findings by Adm. Bien of even more unusual (and sometimes unprecedented) concessions that were extended to LOHRENZ, a single struggling pilot, so that she would not fail.

In his deposition, Adm. Arthur testified, in part, as follows regarding what happened at the March 24 meeting with Respondent DONNELLY:

Q Yes. And you also knew that Admiral Bien's comments... highlighting the special considerations being given these two pilots would also be of concern to Ms. Donnelly?

A Yes.

Q And that would also corroborate what Ms. Donnelly had been concerned about in terms of double standards?

A ... yes, in the final analysis, **you and I both agree we can't send pilots to the fleet that are not qualified, and in this case we sent people to the fleet not qualified.**

Q You have no doubt about her sincerity and her beliefs?

A No, I know she feels these issues very strongly.

Q And you have no doubt that what Lyle Bien reported could be seen by her as corroborating the concerns she expressed to you?

A I'm sure they were, yes.

(Emphasis added).

After almost five months of investigation, DONNELLY and CMR finally published the fully documented 120-page *CMR Special Report: Double Standards in Naval Aviation* on April 25, 1995. The *Special Report* re-published the letter sent to Senator Strom Thurmond containing the concerns of Lt. Burns, and highlighted the training of both Lt. Kara Hultgreen and LOHRENZ by reproducing training summaries and "pink sheets" earned by both women in the FRS. The facts presented therein were true and accurate then, and remain so today. CMR joined the ongoing debate about double standards by setting forth credible evidence, including contrary statements, indicating that female aviators received special concessions, and that Petitioner was one pilot who received even more concessions that permitted her to advance. In the *Special Report*, Respondents referred to LOHRENZ only as "Pilot B," rather than by name.

In response to the *Special Report*, Adm. Bien prepared but did not publicly release a "Supplementary Report on Aviation Training Issues" dated May 4, 1995. Adm. Bien stated that "the sections discussing the training records of the female aviators are largely accurate, as I noted in my first report."

On May 31, 1995 Cmdr. F.J. Kilian, Commanding Officer of Fighter Squadron 213, convened a Field Naval Aviator Evaluation Board (FNAEB) to consider LOHRENZ's flight status.[2] The FNAEB and subsequent reports found that LOHRENZ's flying techniques were "unsafe, unpredictable, and undisciplined," and recommended that LOHRENZ be removed from carrier-based aviation and that she be assigned only to non-carrier aviation. Following the issuance of the FNAEB report and recommendations, the findings were endorsed by LOHRENZ's commanding officer, Cmdr. F.J. Kilian, and Carrier Air Group Commander, Capt. D.M. Gillespie, but they and Battle Group Commander, Adm. Jay B. Yakeley, and Pacific Naval Aviation Commander, Adm. R.J. Spane, concluded that LOHRENZ should be removed from naval aviation.

Following LOHRENZ's removal from flight status in June 1995, LOHRENZ's parents complained to Navy officials and the Navy responded with an extraordinary series of investigations. The first was conducted by Capt. James A. Carman and other officers. The "Carman Report" and other subsequent reports upheld the FNAEB, concluding that LOHRENZ was a consistently poor pilot, and had a pattern

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[2] LOHRENZ declined the opportunity to challenge FRS training records cited by the FNAEB, which were identical to those published by Respondents.

of ignoring instructions from her superiors and blaming others for her own mistakes.

LOHRENZ's parents then wrote to Navy Secretary Richard Danzig, complaining about their daughter's treatment. After yet another investigation, Rear Adm. J.I. Maslowski, Chief of Naval Personnel, informed LOHRENZ on January 22, 1996 that the FNAEB would not be disturbed. Subsequently, Adm. Brent M. Bennit, Commander of the Naval Air Force, U.S. Pacific Fleet, denied LOHRENZ's request for reinstatement of flight status, concluding that she was properly removed from flight status.

The Naval Inspector General re-investigated many of the issues examined in the "Carman Report." On February 10, 1997 the Naval Inspector General issued the "Report of Investigation, Integration of Women Into Carrier Air Wing Eleven" (AW-11 Report).[3] The AW-11 Report concluded, *inter alia*:

> LT Lohrenz was unable to compartmentalize, and this contributed to her performance deficiencies. [T]he FNAEB concluded that other reasons -- lack of motor skills, slow scan, and lack of motivation -- also were contributing factors. But whatever the reason -- stress, lack of motor skills, problems with scanning,

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[3] Petitioner's notoriety and importance to the Navy as one of its female "pioneer" combat aviators is underscored by the sheer number and the scope of investigations which the Navy conducted at her behest after her removal from flight status. The Navy hardly would have devoted such enormous government resources to just any fighter pilot. The multiple investigations conducted by the Navy also corroborated the accuracy of many facts published by Respondent in the *Special Report*.

> inability to comprehend what she was being told to do, unwillingness to comply with the signals of the LSOs [landing signal officers] due to lack of trust or a belief that she knew what was better for her -- the bottom line is that a pilot must respond to the signals of the LSO, and LT Lohrenz did not. A pilot who cannot, or will not, follow the directions of the LSO is inherently unsafe and must be removed from the carrier flying environment.

The AW-11 Report also contained extensive discussions of media coverage and notoriety of Lt. Hultgreen and LOHRENZ as the first female combat pilots in the Navy. The AW-11 Report stated, *inter alia*:

> 146. The media's interest in reporting on the first women in carrier aviation was significant. It was reasonable that the Navy would want the stories to be as positive as possible. Women in combat aviation was an historic and enormous social change, and in the aftermath of several years of negative stories the Navy hoped to get both quality and quantity coverage on this issue.
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> *** *** ***
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> 151. Beyond the individual pressure brought by the focused attention, as the women became "celebrities" additional pressures were introduced, which increased the "obligation" on them to succeed. The failure of any single female aviator would have implications (at least in the media) far greater than the concerned individual. Failure would be portrayed as failure of the female gender. From an institutional standpoint, the Navy should have recognized the serious impact an

> individual female's failure would have on the integration process itself, especially if that woman had previously been the focus of media attention.

Following the Respondents' publication of the *Special Report*, the FNAEB, and LOHRENZ's removal from flight status, the conduct of LOHRENZ and her then-lead counsel, Susan Barnes, illustrates that LOHRENZ had ready access to powerful, major media allies to reply to the statements contained in the *Special Report*, and she utilized these major channels of effective communication to do so. In an affidavit dated May 31, 1997, filed in United States District Court for the District of Columbia, Civil Action No. 96CV2468(EGS), in the case styled *Lohrenz, et al. v. The Department of the Navy*, LOHRENZ's lead counsel testified, *inter alia*, regarding LOHRENZ's access to the media following the release of the *Special Report*, the FNAEB, and LOHRENZ's removal from flight status. LOHRENZ testified that she "approved" the affidavit prior to its filing and stated that her counsel had full authority to do whatever was appropriate to advance her case and her career. The affidavit stated, *inter alia*, as follows:

> 6. The second important source of information has been members of the news media who have communicated with me and my clients during the course of their news gathering for stories on Lt. Lohrenz, Lt. Carel and the other female pilots of Air Wing 11. As the Navy's almost total control over access to the evidence relevant to Plaintiff's claims and Defendant's dispositive motion became increasingly apparent, so did the necessity to cooperate with the reporters who were working on various aspects of the Air Wing 11 story. Lt. Lohrenz in particular has an obligation to mitigate the damages

done by the violation of her Privacy Act rights and the defamation committed by those who released selected and doctored portions of her training records to the public and untruthfully attacked her qualifications as a naval aviator.[4] That means that she must take advantage of every reasonable opportunity to publicize the truth.

7. We concluded that the best way to mitigate her damages would be to cooperate with any responsible reporter's effort to ascertain the truth by providing information in a neutral way which would enable reporters to judge what the truth is for themselves. We made no special arrangements with any of them. Most of the reporters zealously protected the identity of confidential sources just as we did, and they were careful to maintain their independence as objective professionals. Nonetheless as they exchanged information with us as part of the ordinary fact-checking and developing leads that goes on between any good reporter and the subject of a complex story, it became apparent to us that many of them had better access to reliable sources and information inside the Navy than we did.

8. Over the many months that we worked with our own Navy sources and with approximately a half dozen news organizations on various aspects of the story, we were able to piece together a chronology of

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[4] In her deposition, LOHRENZ identified the FRS training records in question, and admitted that none had been "doctored" by Respondents.

what happened and make a positive identification of the participants.

LOHRENZ testified that in December 1995, approximately eight months after the publication of the *Special Report*, and some four months before she instituted her defamation action, she was contacted by NBC's *Dateline* program. Both LOHRENZ and her counsel provided information to *Dateline*, all of it, of course, maligning DONNELLY and CMR and promoting LOHRENZ's version of events. The *Dateline* segment was aired on July 3, 1996. Additionally, in February 1998, LOHRENZ appeared on CBS's *60 Minutes*.

On April 22, 1996 Petitioner LOHRENZ instituted this action for libel and false light invasion of privacy against Respondent ELAINE DONNELLY ("DONNELLY") and Respondent CENTER FOR MILITARY READINESS ("CMR"), as well as News World Communications, Inc. d/b/a the Washington *Times* ("News World"), and the Copley Press, Inc. d/b/a the San Diego *Union-Tribune* ("Copley"). The District Court first held that LOHRENZ was a "limited-purpose public figure" under the test set forth in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C.Cir. 1980), *cert. denied*, 449 U.S. 898 (1980), and its progeny. Pet.App.B, at 57b-61b. It did not state, explicitly or implicitly, that LOHRENZ was an "involuntary limited-purpose public figure," but instead simply left the question open, holding that "plaintiff Lohrenz was a limited-purpose public figure, **albeit possibly involuntarily**." Pet.App.B, at 61b. The District Court found that LOHRENZ engaged in sufficiently volitional and purposeful activity, especially in giving multiple statements to the press regarding her status and abilities as one of the first female F-14 pilots, to render her a "limited-purpose public figure" under *Waldbaum* and its progeny. Pet.App.B, at 58b. It held that as a "limited-

purpose public figure," LOHRENZ was required to bring forth clear and convincing evidence of actual malice in order to avoid summary judgment, and that LOHRENZ had failed to do so with respect to each of the publications which were the subject of her Second Amended Complaint. Pet.App.B, at 69b-91b.

The United States Court of Appeals for the District of Columbia Circuit affirmed. The Court of Appeals concluded that LOHRENZ was a voluntary limited-purpose public figure because she chose combat training in the F-14 while she was well aware of the public controversy over women in combat roles, "and when, as a result of that choice, she became one of the first two women combat pilots, a central role in the public controversy came with the territory." Pet.App.A, at 2a-3a. The Court of Appeals held: "Having assumed the risk when she chose combat jets that she would in fact receive a combat assignment, Lt. Lohrenz attained a position of special prominence in the controversy when she 'suited up' as an F-14 combat pilot." Pet.App.A, at 3a. The Court of Appeals went on to conclude:

> Lt. Lohrenz was not just any fighter pilot; when she "suited up," she could reasonably have been expected to know that she was assuming a position of "'special prominence'" in the controversy about women in combat roles. Again, it was not Lt. Lohrenz's decision to pursue a Navy career as a combat jet pilot that made her a public figure, but rather that in so doing she assumed the risk of success whereby she would become one of the first few women combat pilots and thus necessarily attain "'special prominence'" in an ongoing public controversy about such opportunities. Finally, the result here is consistent with *Gertz*'s principle that only those with

> access to the media to defend themselves should be designated public figures. *See* 418 U.S. at 345. Lt. Lohrenz possessed ready access to the channels of public discourse, as evidenced not only by the media attention she received when first assigned as a combat pilot along with Lt. Hultgreen, but by her appearance on April 19, 1998, on the CBS television program *60 Minutes*.

Pet.App.A, at 19a.

The Court of Appeals concluded that the "actual malice" standard applied to the publications at issue, and held that LOHRENZ failed to meet her burden of proving "actual malice" on the part of Respondents by clear and convincing evidence. Pet.App.A, at 20a-28a.

REASONS FOR DENYING THE WRIT

Review is inappropriate for three reasons. First, the decision of the Court of Appeals finding LOHRENZ to be a voluntary limited-purpose public figure is in keeping with this Court's analysis in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). The Court of Appeals' application of its holding in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C.Cir. 1980), *cert. denied*, 449 U.S. 898 (1980), to the uncontested material facts in this case is consistent with *Gertz*.

Second, because the Court of Appeals found LOHRENZ to be a voluntary limited-purpose public figure, the Petitioner's attempt to skew the Court of Appeals' holding and mischaracterize its analysis as an "involuntary limited-purpose public figure" construct is a red herring. The Petitioner has not demonstrated a conflict among the federal

circuits regarding the scope and application of the voluntary limited-purpose public figure doctrine, and the Court of Appeals did not hold LOHRENZ to be an involuntary limited-purpose public figure.

Third, if accepted, Petitioner's position would do violence to well-established First Amendment principles and would have a chilling effect on protected speech, including speech regarding the policies, conduct, and credibility of powerful and influential government institutions such as the United States Navy.

ARGUMENT

I. THE CONCLUSION OF THE COURT OF APPEALS THAT LOHRENZ WAS A VOLUNTARY LIMITED-PURPOSE PUBLIC FIGURE IS CONSISTENT WITH THIS COURT'S ANALYSIS IN *GERTZ V. ROBERT WELCH, INC.*, 418 U.S. 323 (1974).

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), this Court set forth the general framework for determining when a person is a public figure or a private individual for purposes of application of the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Justice Powell observed that "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Gertz*, 418 U.S. at 343, 94 S.Ct. at 3008.

At the core of Justice Powell's analysis were the opportunities for rebuttal enjoyed by public figures and the risk of publicity which public figures assumed by virtue of their status. Justice Powell properly observed that "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements then [sic] private individuals normally enjoy." *Gertz*, 418 U.S. at 344, 94 S.Ct. at 3009. Justice Powell then observed that just as a public official "runs the risk of closer scrutiny than might otherwise be the case," "[t]hose classed as public figures stand in a similar position." *Gertz*, 418 U.S. at 344-345, 94 S.Ct. at 3009. Justice Powell defined limited-purpose public figures as those persons "who have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," and that in doing so, limited-purpose public figures "invite attention and comment." *Gertz*, 418 U.S. at 345, 94 S.Ct. at 3009. Justice Powell recognized that those who have attained public figure status "have assumed roles of especial prominence in the affairs of society." *Id.* Following this Court's decision in *Gertz*, the United States Court of Appeals for the District of Columbia Circuit expounded the criteria for determining whether a defamation plaintiff is a limited-purpose public figure, or public figure for particular public controversies, in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C.Cir. 1980), *cert. denied*, 449 U.S. 898 (1980).

The Court of Appeals held that a court's first step is to "isolate the public controversy." *Waldbaum*, 627 F.2d, at 1296. It defined a public controversy as "a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants." *Id.*

The Court of Appeals next held that after defining the controversy, the court "must analyze the plaintiff's role in it." *Id.* The plaintiff "must have achieved a 'special prominence' in the debate." *Id.* The Court of Appeals stated:

> The plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution. [footnote omitted] In undertaking this analysis, a court can look to the plaintiff's past conduct, the extent of press coverage, and the public reaction to his conduct and statements. [citation omitted]

Id.

Finally, the Court of Appeals stated that a court's final task was to review the allegedly defamatory publication in conjunction with the public controversy, holding that "the alleged defamation must have been germane to the plaintiff's participation in the controversy." *Waldbaum*, 627 F.2d, at 1298.

Applying the foregoing factors, the Court of Appeals concluded that the plaintiff, Eric Waldbaum, was indeed a limited-purpose public figure. It found that Greenbelt's marketing policies, which the Court characterized as "pathbreaking" and "pioneering," were the subject of public debate and controversy within the supermarket industry and beyond, and that "public controversies existed over the viability of cooperatives as a form of commercial enterprise and over the wisdom of various policies that Greenbelt in particular was pioneering." *Waldbaum*, 627 F.2d, at 1299.

The Court of Appeals next found that Waldbaum was a leading public advocate of the controversial policies and practices of the cooperative and therefore "had thrust himself into the public controversies concerning unit pricing, open dating, the cooperative form of business, and other issues." *Waldbaum*, 627 F.2d, at 1300. Importantly, the Court of Appeals recognized that assumption of risk through purposeful action was the key component in determining the status of a person under Justice Powell's *Gertz* analysis. The Court of Appeals observed that Waldbaum had prior dealings with the press and concluded that in so doing Waldbaum "assumed the risk that comment in the press might turn to the successfulness or profitability of enterprises under his management," which was the subject of the allegedly defamatory statements at issue. *Id.*

The decision of the United States Court of Appeals for the District of Columbia Circuit was the result of the proper application of the *Waldbaum* decision, which had long been recognized in that circuit as the guide for determining whether and to what extent a defamation plaintiff is a public figure. *Tavoulareas v. Piro*, 817 F.2d 762, 772 (D.C.Cir. 1987) (*en banc*). The Court of Appeals' application of the *Waldbaum* test to the uncontested material facts in the present case was also loyal to Justice Powell's concept of the limited-purpose public figure articulated in *Gertz*.

In her Petition, LOHRENZ concedes that a public controversy existed over the assignment of women in combat at all times relevant to the publications in issue. The Court of Appeals properly concluded that LOHRENZ achieved a "special prominence" in the controversy due to her "purposeful action" in choosing to become, and actually achieving the accomplishment of becoming, one of the first two women in combat aviation. "[B]y reason of the notoriety

of [her] achievements," *Gertz*, 418 U.S. at 342, 94 S.Ct. at 3008, in the midst of a national public controversy surrounding the issue, LOHRENZ "invited attention and comment." *Gertz*, 418 U.S. at 345, 94 S.Ct. at 3009. Lohrenz objectively and subjectively assumed the risk of closer public scrutiny due to her being a "pioneer" in naval combat aviation at a time of such public controversy, embarking on a path of conscious, purposeful action and endeavor that could hardly be classified as "sheer bad luck." Indeed, LOHRENZ engaged in a series of conscious decisions which led to her notoriety as one of the first female F-14 pilots. Through her own "purposeful activity," including comments to the press and media about the standards applied to her in her training, she also objectively assumed the risk of publicity. Moreover, LOHRENZ subjectively assumed the risk of publicity because she acknowledged that she was told and fully understood that she would be in the media spotlight when she voluntarily signed her "dream sheet" in order to become one of the first women to fly the F-14 after the controversial 1993 repeal of longstanding policy by Secretary of Defense Les Aspin. LOHRENZ voluntarily injected herself into the controversy surrounding women in combat aviation, and that controversy only magnified after the death of Lt. Kara Hultgreen and the attempt by high Navy officials to obscure the harsh realities surrounding the crash and the training that preceded it. Of course, there is no doubt that the publications at issue made by Respondents were germane to the controversy both before and after the death of Lt. Kara Hultgreen.

The Court of Appeals' recognition of LOHRENZ as a voluntary limited-purpose public figure is also buttressed by her access to "the channels of effective communication," *Gertz*, 418 U.S. at 344, 94 S.Ct. at 3009, following the Respondents' publications at issue. LOHRENZ was contacted

by *Dateline NBC* in 1995 and appeared in a segment on that national broadcast devoted and slanted to her side of the story in July 1996. In 1998 LOHRENZ also appeared on CBS' *60 Minutes* broadcast. The Court of Appeals correctly applied the factors enunciated by Justice Powell in *Gertz* to conclude that LOHRENZ was a voluntary limited-purpose public figure.

II. THE PETITIONER'S ATTEMPT TO CHARACTERIZE THE COURT OF APPEALS' OPINION AS EMBRACING AN "INVOLUNTARY LIMITED-PURPOSE PUBLIC FIGURE" ANALYSIS IS A FALSE CONSTRUCT DESIGNED TO MANUFACTURE A CIRCUIT CONFLICT WHERE NONE EXISTS.

The Petitioner devotes the bulk of her Petition to a discussion of the "involuntary limited-purpose public figure" concept and attempts to characterize the Opinion of the Court of Appeals as embracing such analysis. Such a blatant mischaracterization of the Opinion of the Court of Appeals is merely a false construct created to try to fit a square peg into a round hole and thereby manufacture a conflict amongst the federal circuits where none exists.

Obviously, the Court of Appeals found LOHRENZ to be a **voluntary** limited-purpose public figure. Rather than addressing this holding forthrightly, LOHRENZ re-writes the Opinion below in order to convince this Court that a federal circuit conflict somehow exists as a result of, or has been created by, the Opinion of the United States Court of Appeals for the District of Columbia Circuit. This is nothing but a red herring based upon a preexisting academic treatise having nothing to do with the uncontested material facts of the case. See, Smolla and Nimmer, 2 *Smolla and Nimmer on Freedom*

of Speech, §23:4, at 23-40.7 - 23-40.9. In fact, large portions of LOHRENZ's Petition read virtually verbatim from this treatise. Essentially, Petitioner is attempting to paint herself as an involuntary limited-purpose public figure in order to create an issue where none exists. LOHRENZ simply cannot re-write the Opinion below and engage in revisionist history to fit a preconceived legal argument that simply does not apply here.

With respect to voluntary limited-purpose public figures, there exists no conflict amongst the federal circuits, let alone a "sharply defined conflict... between the Court of Appeals for the District of Columbia and the Court of Appeals for the Fourth Circuit." *Petition*, at 24. The United States Court of Appeals for the Fourth Circuit has, in fact, embraced an analysis consistent with that of the District of Columbia Circuit in *Waldbaum* and in the Opinion below. See, *Carr v. Forbes, Inc.*, 259 F.3d 273, 280 (4th Cir. 2001), *cert. denied*, 535 U.S. 988, 122 S.Ct. 1542, 152 L.Ed.2d 468 (2002) (discussing five-factor test to determine whether plaintiff has thrust himself into a controversy to the extent necessary to trigger limited-purpose public figure status).

The Petitioner's assertion that the Fourth Circuit's decision in *Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999), *cert. denied*, 528 U.S. 1118, 120 S.Ct. 939, 145 L.Ed.2d 817 (2000), somehow establisnes a circuit conflict with the United States Court of Appeals for the District of Columbia Circuit by virtue of the Opinion below is utterly lacking in merit. In *Wells*, the Fourth Circuit held that the plaintiff's actions could not establish her voluntary public-figure status because her "discussions with the FBI, response to the grand jury subpoena, and appearance before the Senate committee simply were not voluntary actions but rather were compelled by force of law." *Wells*, 186 F.3d, at 536. In stark contrast,

LOHRENZ's conscious series of decisions and actions in the midst of an ongoing public and highly political controversy, "purposeful action of [her] own," in Justice Powell's words, were volitional and in no way compelled by force of law or otherwise.

The Court below quite correctly concluded that "Lt. Lohrenz was not just any fighter pilot." Pet.App.A, at 19a. LOHRENZ's access to channels of effective communication existed long before the Respondents' publications and continued following such publications, as epitomized by the *Dateline NBC* and *60 Minutes* segments devoted to LOHRENZ. Under *Gertz*, Respondents were entitled to act on the assumption that LOHRENZ was not exempt from publicity given the uncontested material facts and the contours of the public controversy preceding the publications at issue. The Opinion below is not in conflict with the decisions of other federal circuits, and is true to Justice Powell's analysis in *Gertz*.

III. CLASSIFYING LOHRENZ AS A "PRIVATE FIGURE" WOULD DO VIOLENCE TO ESTABLISHED FIRST AMENDMENT VALUES.

There can be no doubt that a substantial ongoing public controversy existed regarding the assignment and training of women in combat positions long before the Respondents published anything regarding LOHRENZ. Such public controversy dealt directly with the policies, conduct, and standards of a powerful government institution, the United States Navy. In the wake of the Hultgreen crash, multiple newspapers and media reported on the double standards issue and the Navy's denials of allegations of double standards, including ABC, CBS, and the New York *Times*, among others. The central First Amendment value of free and open

debate over matters of governmental policies and practices is at its pinnacle in such circumstances. The position advocated by Petitioner would undermine, if not totally obliterate, this central First Amendment value to fit the subjective sensibilities of Petitioner after the fact.

LOHRENZ was a key player in a public controversy regarding a powerful government institution charged with protecting the interests of the United States and the lives of its citizens. Citizens generally and the press and media must be accorded free rein in discussing the management and policies of government institutions and those persons involved in controversies concerning the management and policies of such institutions. In the months preceding the publications at issue, multiple media and press reported and opined on the double standards issue. The Respondents, after extensive investigation, published detailed information on the double standards issue. The approach advocated by Petitioner would cordon off from scrutiny and comment the details of public controversy, including names, dates, and actions relevant to the public controversy. "Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686, 109 S.Ct. 2678, 2695, 105 L.Ed.2d 562 (1989), citing *Gertz*, 418 U.S., at 342, 94 S.Ct., at 3008. Acceptance of Petitioner's position would have a profound chilling effect on freedom of speech and the press, as the press and media would abstain from publishing detailed information that might be viewed, after the fact, as crossing the amorphous line of demarcation subjectively established by Petitioner's legal construct and the negligence standard proceeding from such construct. The balance struck under such a regime actually would be one of self-censorship for

fear of hindsight retribution, and an imbalance dangerous to the rights and liberties of all citizens generally and anathema to concepts of self-government. Acceptance of Petitioner's characterization of herself as anything but a public figure would stifle public awareness, debate, and criticism of government institutions and would be at odds with well-established First Amendment principles. This Court should not accept Petitioner's invitation to embark on such a dangerous course.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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